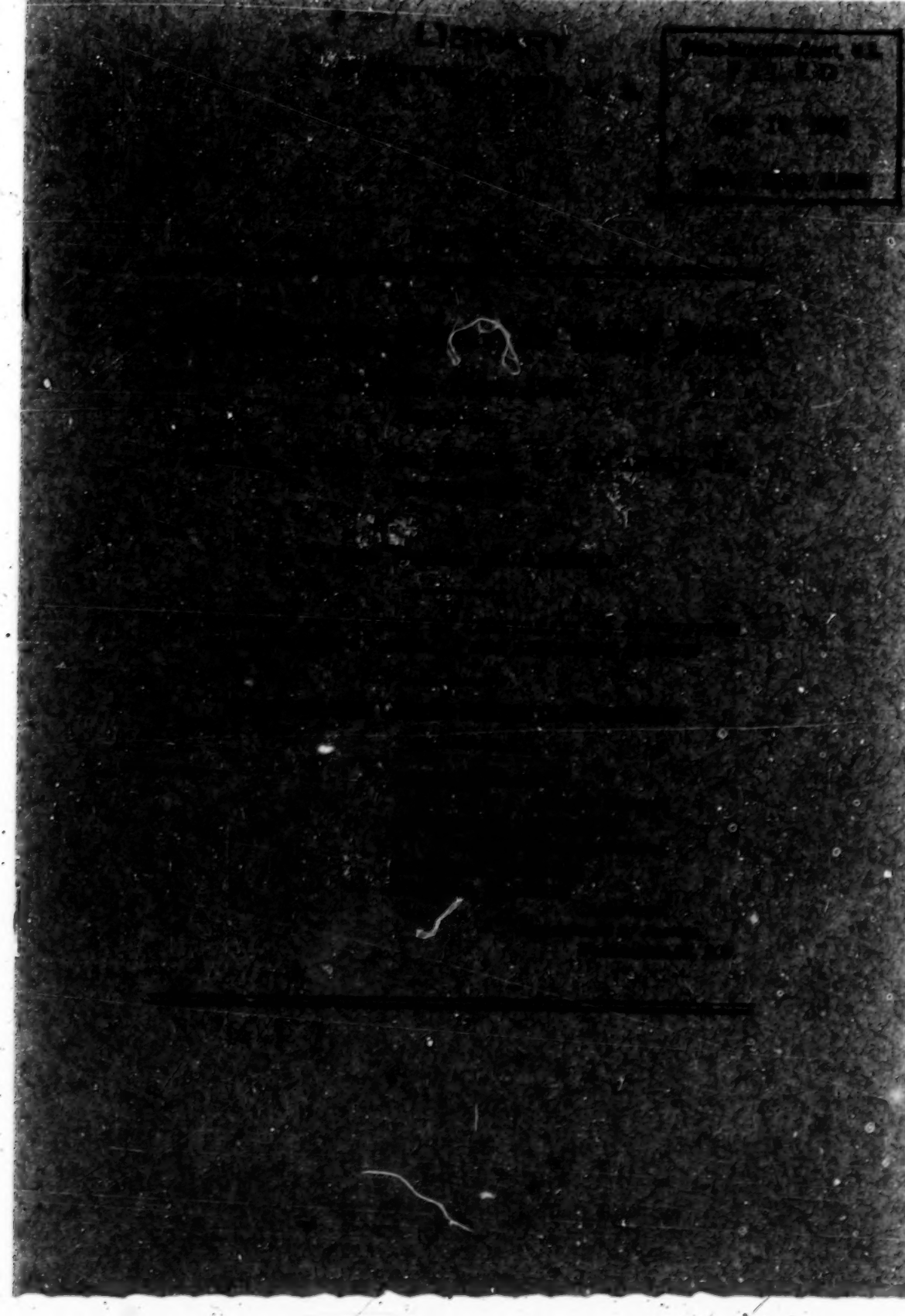

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 314

JAMES R. HOFFA AND ROBERT E. McCARTHY, JR.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals dismissing petitioners' appeal (Pet. App. 25a; R. 397) is not reported.

JURISDICTION

The order of the court of appeals was entered on June 1, 1962 (Pet. App. 25a; R. 397). A petition for rehearing was denied on July 12, 1962 (Pet. App. 32a; R. 406). The petition for a writ of certiorari was filed on August 9, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether orders of the district court quashing certain subpoenas issued in connection with a hearing on a motion to dismiss an indictment were properly held to be non-final and hence unappealable under 28 U.S.C. 1291.

STATUTE INVOLVED

28 U.S.C. 1291 provides in pertinent part as follows:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * except where a direct review may be had in the Supreme Court.

STATEMENT

Petitioners were indicted on October 11, 1961, on sixteen counts charging fraud by mail and wire, and conspiracy to use the mails to defraud (R. 1–20). On November 30, 1961, they moved to dismiss the indictment on numerous grounds (R. 21–29), including a claim that prejudicial publicity generated by the government deprived them of an impartial grand jury (R. 25–26, 28). A hearing was set by the district court for March 12, 1962. In connection with the hearing, petitioner Hoffa caused subpoenas to be served upon numerous persons, including counsel for the government in the cause, the Attorney General and a former Attorney General and various of their assistants, the Secretary of Labor, the senior Senator from Arkansas and counsel to several Senate Committees, various state officials, journalists and others. The government moved to quash the subpoenas addressed to present and former government officials.

By orders dated March 9, 1962 (R. 350–351) and March 12, 1962 (R. 352), the district court quashed nine of these subpoenas.[1] The court reserved consid-

[1] At the same time the court also granted motions to quash subpoenas addressed to four private individuals.

eration of a motion to quash the subpoena served on an agent of the Federal Bureau of Investigation and noted that the withdrawal of the subpoena served on counsel for the government rendered it unnecessary to rule on that motion to quash (R. 351). On March 14, the court entered an order denying the motion to quash the subpoena ad testificandum served on the F.B.I. agent, but granting it in so far as the duces tecum portion was concerned. In the same order the court made a similar ruling as to a subpoena ad testificandum and duces tecum served on a Supervising Investigator of the Immigration and Naturalization Service (R. 353–354).

The court of appeals dismissed petitioners' appeal from the orders quashing the subpoenas on finding that "such orders are not 'final decisions' within the contemplation of Title 28 U.S. Code, Section 1291" (Pet. App. 25a; R. 397).

ARGUMENT

The court of appeals correctly held that the orders in question were not final orders within the meaning of 28 U.S.C. 1291. The order of the district court entered on May 23, 1962, denying petitioners' motions to dismiss the indictment was indisputably interlocutory.[2] Indeed, petitioners did not attempt to ap-

[2] See, *e.g.*, *Parr* v. *United States*, 351 U.S. 513, 518, rehearing denied, 352 U.S. 859; *Chereton* v. *United States*, 256 F. 2d 576 (C.A. 6); *United States* v. *Golden*, 239 F. 2d 877, 878 (C.A. 2); *Kyle* v. *United States*, 211 F. 2d 912, 914 (C.A. 9); *United States* v. *Foster*, 278 F. 2d 567, 569 (C.A. 2), certiorari denied, 364 U.S. 834; *Atlantic Fishermen's Union* v. *United States*, 197 F. 2d 519, 520 (C.A. 1); *Conway* v. *United States*, 142 F. 2d 202, 203 (C.A. 9); *United States* v. *Tiplitz*, 202 F. 2d 60 (C.A. 3).

peal therefrom directly.[3] Certainly, therefore, orders granting motions to quash subpoenas issued at the instance of petitioners in connection with the hearing on their motions to dismiss cannot be construed as final decisions.

There is no merit to petitioner's argument that the court's orders quashing the subpoenas should be treated as "final" under the principles established by the decisions of this Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541; *Swift & Co.* v. *Compania Caribe*, 339 U.S. 684; and *Stack* v. *Boyle*, 342 U.S. 1. In those cases it was determined that if review of the collateral order (*e.g.*, denying a corporation's motion that the plaintiff in a stockholder's derivative action be required to give security for reasonable expenses; denying a criminal defendant's pretrial motion to reduce bail) was to be available at all, it had to be provided immediately and could not await the final disposition of the case and a subsequent appeal. Here, petitioners have no claim that "the practical effect of the order will be irreparable by any subsequent appeal." *DiBella* v. *United States*, 369 U.S. 121, 126. On the contrary, they may obtain full and effective review of their contentions that the indictment should have been dismissed once the case has proceeded to final judgment, should that judgment be adverse.

If, as petitioners argue, the court's orders quashing the subpoenas fall within the class of independent pro-

[3] Instead, they sought appellate review by way of mandamus. That proceeding is the subject of their petition in No. 364, this term.

ceedings recognized in *Cohen, Swift & Co.*, and *Stack*, then, by parity of reasoning, every civil litigant whose pre-trial motion for discovery is denied would be entitled to an immediate appeal. Orders denying such motions are, of course, invariably treated as interlocutory.

In *DiBella* v. *United States*, *supra*, at 129, this Court held that even where there has been no indictment, an order granting or denying a motion to suppress evidence which might be used in a future criminal trial "does not fall within any class of independent proceedings" recognized in *Cohen, Swift & Co.*, and *Stack* as making the order final and appealable. Still less can the rationale of those cases be of help to petitioners here, where the rulings followed the indictment. Here, even more plainly than in *DiBella*, it must be concluded that "the criminal trial is * * * fairly in train." *Id.* at 131.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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